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IN THE

Supreme Court of the United States

October Term, 1955.

No. 862.

THE COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA, a corporation organized under the laws of the State of New York, with its home office at Utica, New York,

Petitioner,

vs.

J. C. SCHUTT, Administrator of the Estate of JOHN P. BELL, deceased, JANE BELL, FRANCES BELL EBLING and MARGARET BELL DOUGLAS, Residents of Davidson County, Tennessee,

Respondents.

Brief for Respondents in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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THE REPORTER COMPANY, INC., Walton, N. Y.—1956

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions Below.

The opinion of the District Court for the Northern District of New York is not reported. The unanimous opinion of the Court of Appeals for the Second Circuit is reported at 229 F. 2d 158.

Jurisdiction.

The jurisdictional requirements are adequately set forth in the petition.

Constitutional Provisions and Statutes Involved.

In addition to the Tennessee statutes referred to in the petition (p. 5), the case also involves Chapter 127 of the Laws of Tennessee of 1897 (Williams Tennessee Code, Sec. 6219) a copy of which is set forth in Appendix A hereto.

Questions Presented.

The complaint sets forth two causes of action. The first cause of action alleges that on July 29, 1942, the petitioner issued its policy of insurance to one John P. Bell, under which it agreed to pay the sum of $10,000 to the beneficiaries therein named in the event said insured lost his life prior to age 70 "from bodily injuries effected solely and exclusively by external, violent and accidental means," that certain of the respondents were named as beneficiaries in the policy, that the insured did lose his life in the manner contemplated by the policy on October 8, 1950, as a result of a fire which destroyed his residence in Davidson County, Tennessee, that the insured was sixty years of age at the time of his death and that payment under the policy has not been made (R. 3a-5a). The second cause of action alleges that prior to the bringing of the action here involved, the respondents had instituted suit against the petitioner in Part II of the Chancery Court of Davidson County, Tennessee, to recover on said insurance policy, that the summons was duly issued and served upon the petitioner as a non-resident insurance corporation

in accordance with the laws of Tennessee by serving the same upon the insurance commissioner accompanied by a required affidavit, that the summons was in due course and as required by law transmitted to petitioner at its home office in Utica, New York, but that the petitioner failed to appear and judgment was entered for $10,000, the face amount of the policy, together with interest of $328.32 and "and the further sum of $2,500 as a penalty because of the bad faith of the defendant in failing and refusing to pay said claim in accordance with and as authorized by Section 6434 of the Code of Tennessee." The complaint accordingly demanded judgment for $12,828.32, the amount of the judgment recovered in the Tennessee action, with interest and costs (R. 5a-7a).

The petitioner moved on affidavits to dismiss the second cause of action on the ground that the judgment therein alleged was void and not entitled to full faith and credit under Article 4, Section 1 of the Constitution of the United States, "because the Chancery Court of Davidson County in Nashville, Tennessee by whom it was granted as a 'default judgment *pro confessio*' had no jurisdiction over this defendant" (R. 16a). Answering affidavits were interposed on behalf of respondents (R. 25a-39a).

The question presented is whether or not the Tennessee Court had jurisdiction over the petitioner in the Tennessee action.

Statement of the Case.

Petitioner is a membership corporation organized under the Insurance Law of the State of New York, with its home office in Utica, New York, and is authorized to grant personal accident and health insurance to its members (R. 19a). John P. Bell became a policyholder of

petitioner on or about December 29, 1937, while a resident of Kentucky, at which time a membership certificate was issued to him (R. 13a, 21a). Subsequently and on or about July 29, 1942, while still a resident of Kentucky, a new certificate bearing the same number was issued to him (R. 13a, 21a). A short time later he moved to Tennessee where he continued to reside until the date of his death (R. 21a). From the time when the insured moved to Tennessee until the date of his death, the petitioner regularly communicated with him by mail, addressed to him at his residence in that state, and premiums were paid by him from that address (R. 21a, 25a-27a). Following the death of the insured, respondents filed with the petitioner due notice of death, proofs of death and claims for benefit, and upon petitioner's refusal to pay the amount of the policy, an action was instituted against petitioner in Part II of the Chancery Court of Davidson County at Nashville, Tennessee, by service upon the insurance commissioner of the State of Tennessee (R. 5a-7a, 14a). The summons in the action was promptly transmitted and delivered to petitioner at its home office in Utica, New York, and was actually received by petitioner on or about April 2, 1951 (R. 5a, 6a, 23a, 24a). However, petitioner refused to defend the action and judgment by default was entered for $12,828.32 (R. 6a, 9a-11a, 23a, 24a).

For many years prior to the bringing of the action referred to petitioner had been engaged in the business of writing accident and health insurance throughout the United States in a manner typical of the mail-order insurance business. Applications for membership were mailed to petitioner at its home office in Utica, New York, and delivery of insurance policies and notices of assessment as well as payment of premiums by the policyholder and payment of claims by the petitioner were usually ac-

complished by mail (R. 20a-21a). It appears also that for many years prior to the bringing of the action the petitioner had been actively engaged in the solicitation of insurance contracts in the State of Tennessee. The petitioner regularly forwarded to all of its members residing in the state application forms and other literature to be used by them in the solicitation of new members. These members in turn actively solicited new members and the soliciting members were compensated by petititoner by being permitted to select merchandise from lists furnished to the member. The cost of this compensation was treated by petitioner as an ordinary operating expense in the same manner that other foreign insurance companies charged expenses and compensation for local soliciting agents (R. 25a-40a). This method of operation was a mere subterfuge designed to cover up the fact that such soliciting members were agents of petitioner within the State of Tennessee (R. 28a-29a). Following the death of John P. Bell, petitioner sent a representative to Nashville, Tennessee, where he remained for a number of days, conducting a detailed investigation as to the facts of the accident and retaining others residing in that state to assist him in the investigation (R. 29a).

ARGUMENT.

I.

The judgment of the Court of Appeals is not final and the issues involved are not fundamental to the further conduct of the action.

The decision of the District Court was based on affidavits submitted by the petitioner which were largely confined to bare conclusions to the effect that the petitioner had no office in the State of Tennessee, that it had no officers, agents or employees within the state, that it did not own any property, real or personal located within the state and that it had never transacted any business in the state. These affidavits were controverted by affidavits submitted by the respondents. The District Court, despite the issues raised by the affidavits, granted the motion and the Court of Appeals, in reversing, remanded the action to the District Court. It is anticipated that, on a trial of the action, further evidence will be presented with respect to the activities of the petitioner in the State of Tennessee with the result that the issues determined by the Court below may not even be involved when the case is tried on the merits. Any review of the judgment at this stage of the litigation would thus be premature.

Land v. Dollar, 330 U. S. 731, 734;
United States v. General Motors Corporation, 323 U. S. 373, 377.

II.

The decision here involved is not in conflict with the decisions of the Court of Appeals for the Fifth Circuit.

As pointed out in the opinion of the Court below, the decisions of the Court of Appeals for the Fifth Circuit in *Parmelee v. Iowa State Traveling Men's Association,* 206 F. 2d 518, and *Parmelee v. Commercial Travelers Mutual Accident Association of America,* 206 F. 2d 523, are not in point since the Florida statute there involved showed on its face that it was only applicable to policies of insurance issued and delivered in the State of Florida, whereas the Tennessee statute here involved contained no such provision.

III.

The decision here involved is not in conflict with applicable decisions of this Court.

The decisions of this Court relied upon by the petitioner in its petition all antedate the decisions in *International Shoe Company v. Washington,* 326 U. S. 310 and *Travelers Health Association v. Virginia,* 339 U. S. 643. Indeed *Minnesota Commercial Men's Ass'n v. Benn,* 261 U. S. 140, upon which petitioner chiefly relies, was in effect overruled in the *Travelers Health Association* case, the majority opinion commenting on the case as follows (p. 647):

> "• • • the narrow grounds relied on by the Court in the *Benn* case cannot be deemed controlling."

Moreover, the facts in the case now before the Court go far beyond those present in the *Travelers Health Association* case. Here we have not only solicitation through the mails but active solicitation by the petitioner through its members who were compensated for their services under the subterfuge of being permitted to select gifts from a list supplied by petitioner, the cost of which was charged by petitioner as an ordinary operating expense. More than that, following the death of insured and prior to the bringing of the Tennessee action, the petitioner had sent a representative to Tennessee where he conducted a detailed investigation of the facts surrounding the accident. Even before the decision of this Court in the *International Shoe Company* case, such latter acts in and of themselves would have been held to be doing business in the State of Tennessee.

Lumbermen's Insurance Company v. Meyer, 197 U. S. 407;
Commercial Mutual Accident Company v. Davis, 213 U. S. 245.

It should be noted also that the question now raised as to inclusion in the Tennessee judgment of the additional costs and expenses of $2,500, was not stated as a ground of dismissal in the original motion, the motion having been made solely on the ground that the Tennessee Court "had no jurisdiction over this defendant" (R. 16a). And in any event, assuming that the provisions of the Tennessee statute pursuant to which these items were included are held to be unconstitutional as applied to the facts here involved, this would not result in voiding the judgment in its entirety but only to the extent of the items so included.

Aetna Life Insurance Company v. Dunken, 266 U. S. 389, 400.

That issue, of course, can be squarely raised when the case is tried on the merits.

IV.

No important question of Federal Law is involved which has not been but should be settled by this Court.

The petitioner claims that the Tennessee statute is in violation of Section 8 of Article I of the Constitution, under which there is granted to Congress the power to establish post offices and post roads. The Tennessee statute contains no provision even remotely attempting to infringe upon this power of the Congress. More than that, as had been previously indicated, the jurisdiction of the Tennessee Court over the petitioner was not dependent entirely upon its activities through the mails but, on the contrary, was predicated upon many activities of the petitioner within the State of Tennessee the sum total of which exceeded the "minimum contacts" required by the decisions of this Court.

CONCLUSION.

For the reasons set forth it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated: May 3, 1956.

Respectfully submitted,

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Appendix A.

Chapter 127 of the Laws of Tennessee of 1897:

Section 5 (modified):

Commissioner to be attorney upon whom process against non-resident corporations may be served. Every corporation organized under the laws of another state or foreign country, and transacting the business of life or accident insurance on the assessment plan, shall before doing business in this state, appoint in writing, the commissioner of insurance or successor in office, to be its true and lawful attorney, upon whom all process in any action, suit, or proceeding against it may be served, and in such writing, shall agree that any lawful process against it which is served on said attorney, shall be of the same legal force and validity as if served on the corporation, and that the authority shall continue in force so long as any liability remains outstanding against the corporation in this state. Service upon such attorney shall be deemed sufficient service upon the principal; when legal process against any such corporation is served upon the commissioner he shall immediately notify the corporation of such service, by registered return-receipt letter.

Williams Tennessee Code #6219.